LEE GEE PHENG

v.

RHB BANK BHD

COURT OF APPEAL, KUALA LUMPUR
NIK HASHIM JCA
AUGUSTINE PAUL JCA
ZAINUN ALI J
[CIVIL APPEAL NO: W-02-389-2002]
21 OCTOBER 2003

LAND LAW: *Charge - Order for sale - Land held under Land Office Title - Order for sale issued by Land Administrator under s. 263 National Land Code 1965 - Application by chargee to High Court for substitute order for sale - Whether application to be treated as fresh application for a 'section 256' order for sale - Whether proceedings under 265(3)(c) merely to convert/ transform Land Administrator's order for sale into High Court's order for sale - Whether High court functus officio after granting substitute order for sale - Whether partial payments by chargor to chargee meet requirements of s. 266*

The chargee/bank had earlier granted the chargor/borrower a housing loan of RM80,000 which was secured by a charge over a piece of land that was held under a Land Office Title. The borrower, however, defaulted in the repayment of the loan and the bank served a notice in Form 16D on her. Thereafter, the bank applied to the Land Administrator for an order for sale under s. 260 of the National Land Code 1965 ('NLC'). The Land Administrator acquiesced to the bank's application. After two unsuccessful public auctions, the Land Administrator withdrew the land from the sale and issued a certificate of reference to the High Court under s. 265(3)(b) NLC. The bank then applied to the High Court for a substitute order for sale. The High Court allowed the bank's application and the borrower appealed against it but later withdrew her appeal. Subsequently, however, the borrower applied to have the substitute order for sale set aside. The High Court dismissed the application and the borrower filed the instant appeal.

Held (dismissing the appeal):
Per Nik Hashim JCA

[1a] Section 265(3)(c) NLC does **not** mandate that an application for a substitute order for sale be treated by the court as a fresh application for an order for sale. The section merely confers the court with the power to substitute an order for sale made by the Land Administrator under s. 263 NLC with an order for sale under s. 256 NLC; or, in other words, to transform the order of the Land Administrator into an order of the High Court. It will, therefore, be unnecessary, in the circumstances, to issue a fresh notice in Form 16D. (pp 643 h & 644 a-d)

[1b] In issuing the order for sale, the Land Administrator had complied with all the procedural requirements of the NLC. The proceedings at that stage were also not challenged by the borrower. The borrower could also have continued with her appeal before the High Court under s. 418 NLC but she chose not to proceed with it. Consequently, the merits and the validity of the order for sale issued by the Land Administrator could **not** be challenged at the proceedings brought by the bank for the substitute order for sale. (p 644 e-f)

[2] The High Court was right in holding that it was functus officio after having heard and allowed the bank's application for the substitute order for sale. Once an order of the court has been drawn up and perfected, it may not, as a general rule, be altered, varied or set aside. (p 645 d)

[3] The partial payments made by the borrower to the bank subsequent to the Land Administrator's order for sale were not of the kind contemplated by s. 266 NLC. Under s. 266 NLC, an order for sale shall cease to have effect only upon the chargor tendering payment of the **full** amount due and owing before the conclusion of the sale. (p 645 g-h)

[Borrower's appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pemegang gadaian/bank telah memberi pinjaman perumahan sebanyak RM 80,000 kepada penggadai/peminjam yang dijamin oleh gadaian ke atas sebidang tanah yang dipegang di bawah satu hakmilik Pejabat Tanah. Peminjam gagal membayar balik pinjaman dan satu notis Borang 16D telah diserahkan kepadanya. Berikutnya bank memohon kepada Pentadbir Tanah dan memperoleh

perintah penjualan di bawah s. 260 Kanun Tanah Negara ('KTN'). Bagaimanapun, selepas gagal dalam dua percubaan melelong, Pentadbir Tanah telah menarik balik penjualan dan mengeluarkan sijil rujukan kepada Mahkamah Tinggi di bawah s. 265(3)(b) KTN. Bank kemudian memohon kepada Mahkamah Tinggi dan memperoleh satu perintah penjualan gantian. Peminjam merayu terhadap perintah penjualan gantian tetapi kemudiannya telah menarik balik rayuan. Berikutnya, peminjam memohon untuk mengetepikan perintah penjualan gantian. Permohonan peminjam telah ditolak oleh Mahkamah Tinggi dan peminjam memfailkan rayuan semasa.

Diputuskan (menolak rayuan):
Oleh Nik Hashim HMR

[1a] Seksyen 265(3)(c) tidak menegaskan bahawa sesuatu permohonan untuk perintah penjualan gantian harus dianggap sebagai satu permohonan baru untuk perintah penjualan. Seksyen itu hanya memberikan mahkamah kuasa untuk mengganti suatu perintah penjualan yang dibuat oleh Pentadbir Tanah di bawah s. 263 KTN dengan satu perintah penjualan di bawah s. 265 KTN; atau, dalam lain perkataan, untuk menjadikan perintah Pentadbir Tanah kepada suatu perintah Mahkamah Tinggi. Dengan itu, ianya tidaklah perlu, dalam halkeadaan yang wujud, untuk mengeluarkan satu notis Borang 16D yang baru.

[1b] Dalam mengeluarkan perintah penjualan, Pentadbir Tanah telah mematuhi kesemua syarat-syarat prosedur KTN. Prosiding pada peringkat itu juga tidak dicabar oleh peminjam. Selain itu, peminjam boleh meneruskan rayuannya di hadapan Mahkamah Tinggi di bawah s. 418 KTN, tetapi memilih untuk tidak meneruskannya. Oleh yang demikian, soal merit dan kesahan perintah penjualan yang dikeluarkan oleh Pentadbir Tanah tidak boleh dicabar dalam prosiding yang dibawa oleh bank bagi mendapatkan perintah penjualan gantian.

[2] Mahkamah Tinggi adalah betul dalam mendapati bahawa ia telah *functus officio* setelah mendengar dan membenarkan permohonan bank untuk perintah penjualan gantian. Sebagai suatu kaedah am, sebaik sahaja sesuatu perintah mahkamah digubal dan disempurnakan, ianya tidak lagi boleh dipinda, diubah atau diketepikan.

[3] Pembayaran sebahagian yang dibuat oleh peminjam kepada bank selepas perintah penjualan oleh Pentadbir Tanah bukanlah dari jenis yang dimaksudkan oleh s. 266 KTN. Di bawah s. 266 KTN, sesuatu perintah penjualan akan hanya menjadi tidak berkesan jika penggadai menjelaskan sepenuhnya jumlah yang terhutang sebelum penjualan berkenaan dilaksanakan.

Rayuan peminjam ditolak dengan kos.]

Case(s) referred to:

Arab Malaysia Finance Bhd v. Shamsuddin Ahmad & Anor [1997] 4 CLJ Supp 469 ***(foll)***

Badiaddin Mohidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Bank Islam Malaysia Bhd v. Shamsuddin Hj Ahmad [1999] 450 MLJU 1 ***(refd)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor [1996] 2 CLJ 586 FC ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grand Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA ***(refd)***

Legislation referred to:

National Land Code, ss. 256, 260, 263, 265(3)(b), 266, 418

Rules of the High Court 1980, O. 20 r. 11, O. 28 r. 4(1), O. 32 r. 6, O. 35 r. 2, O. 83

For the appellant/chargor - TY Teh; M/s TY Teh & Assoc

For the respondent/chargee - Brendan Siva (Amin Mohd Salleh); M/s Kadir, Andri Aidham & Partners

Reported by Gan Peng Chiang

JUDGMENT

Nik Hashim JCA:

Facts

The respondent bank granted the appellant a housing loan in the sum of RM80,000, secured by a charge dated 2 August 1983, and executed by the appellant in favour of the respondent over a piece of land held under a Land Office Title, namely H.S. (M) 5933, Lot No. 435, Mukim Petaling Wilayah Persekutuan (the land).

By reason of the appellant's default in servicing the said loan a Form 16D was issued by the respondent to the appellant on 6 November 1985. The appellant failed to comply with the same. Thereafter, the respondent applied to the land office for an order for sale under s. 260 of the National Land

Code 1965 (the Code). After carrying out an enquiry on 24 May 1989, the Land Administrator granted an order for sale on the same day (the 1st order for sale). No challenge was made by the appellant against the 1st order for sale.

Thereafter two public auctions were conducted on 26 October 1989 and 27 July 1990 respectively. Both auctions were unsuccessful. Consequently on 1 March 1994 a certificate of reference under s. 265(3)(b) of the Code was issued to the High Court by the Land Administrator.

Hence, the respondent filed the originating summons dated 13 March 2000 in the High Court for substitution of the order for sale by the land office. On 14 June 2001, the High Court granted order in terms of the originating summons (the 2nd order for sale). The appellant appealed against the 2nd order for sale but later withdrew the appeal.

Subsequently, an application to set aside the 2nd order for sale of the High Court was filed by the appellant on 11 October 2001 (the application). The application was dismissed by the learned High Court judge on 10 May 2002.

The appeal before this court is against the decision of the learned High Court judge in dismissing the application.

Appeal

Essentially, the appellant's complaints are that the order and the originating summons are defective, null and void for non-compliance with the relevant provisions and requirements of the Code, the charge instrument registered on 2 August 1983, O. 83 of the Rules of the High Court 1980 (the RHC) and the law.

It is to be noted that the land is held under a Land Office Title. The provisions applicable to the sale of such land are set out in ss. 260 to 265 of the Code. These provisions have been complied with in this case and accordingly the 1st order for sale was made by the Land Administrator on 24 May 1989. Subsequently, two public auctions were held but both were unsuccessful.

Section 265(3)

Section 265(3) of the Code provides that in the event of two unsuccessful auctions the land shall be withdrawn from sale and the Land Administrator shall refer the matter to the High Court which court may substitute the order of the Land Administrator with an order for sale under s. 256 of the Code. By its terms, it is clear that s. 265(3) cannot be construed as requiring the High Court to treat the originating summons as a fresh application for an order for sale of land held under registry title requiring compliance by the respondent

with the provisions applicable thereto. Section 265(3) merely confers on the High Court the power to substitute the 1st order for sale under s. 256. In this regard, we were referred to the case of *Arab Malaysia Finance Bhd v. Shamsuddin Ahmad & Anor* [1997] 4 CLJ Supp 469 where at p. 476 Hishamudin Yunus J said:

> It, therefore, follows that the reference to s. 256, in sub-s. 3(c) of s. 265, cannot be construed as the imposition of a duty or the conferment of a right on the chargee to make a fresh application for sale under s. 256; neither can the chargor be permitted to treat the reference as such ...

That case was followed by Alauddin J (as he then was) in *Bank Islam Malaysia Bhd v. Shamsuddin bin Haji Ahmad* [1999] 450 MLJU 1 where his Lordship said:

> Sungguhpun s. 256 di sebut didalam subklausa (c) (s. 265(3)) ini tidak bermakna bahawa ianya boleh dianggap bahawa permohonan plaintif di buat dibawah seksyen tersebut.

We agree with the aforesaid views. The procedure for sale prescribed under s. 265(3) is merely a continuation of the proceeding of transforming the order for sale by the Land Administrator into that of the High Court. Thus, there is no need for a fresh Form 16D to be issued in this case.

Since all the requirements to obtain the 1st order for sale of the land held under Land Office Title had been duly complied with and no challenge had ever been made against it, the appellant could not at the originating summons stage question the merits of the 1st order for sale granted by the Land Administrator. The appellant could have appealed to the High Court under s. 418 of the Code which she initially did only to withdraw it later. It follows therefore that the validity of the 1st order for sale cannot now be challenged.

Functus Officio

The appellant also complained that the learned judge erred in law and in fact in ruling that he was *functus officio* when deciding on the application.

It is worthy of note that once an order of court has been drawn up and perfected, as in this case, it cannot be altered, varied or set aside as the court is *functus officio.* The proper recourse for a party dissatisfied with the order is to appeal against it. However, this general principle is subject to certain established exceptions which allow the court to set aside or amend a final order. A final order may be set aside or amended without the need to appeal in the following cases:

(i) to correct errors in expressions of the intention of the court (the slip rule) pursuant to O. 20 r. 11 of the RHC;

(ii) where the order is made in the absence of a party at the hearing: O. 28 r. 4(1); O. 32 r. 6; O. 35 r. 2 of the RHC;

(iii) where the order has been obtained in breach of natural justice: *Muniandy a/l Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586.

(iv) where the order contravenes a substantive statutory provision rendering it defective on grounds of illegality or lack of jurisdiction; and

(v) where the justice of the case requires the court to correct a serious defect in the order: *Badiaddin bin Mohidin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; *Selvam Holdings (Malaysia) Sdn Bhd v. Grand Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16.

The present case does not fall within any of the abovementioned established exceptions. Both the appellant and her counsel knew of the hearing date and the appellant was present in court but chose not to say anything against the respondent's application for the 2nd order for sale. The learned judge was therefore correct in dismissing the appellant's application.

Section 266

Further, the appellant alleged that the respondent had breached s. 266 of the Code with the compromise and acceptance of payments after the Land Administrator's 1st order for sale. However, learned counsel for the respondent contended that there is no evidence of any compromise between the appellant and the respondent. The appellant had however made certain payments toward the amount due and owing by the appellant to the respondent. These had been taken into account to reduce the amount outstanding.

Section 266 of the Code does not prohibit the acceptance by the respondent of payments from the appellant after the 1st order for sale. The section provides that an order for sale ceases to have effect only upon payment by the chargor to court of the full amount due and owing, including the amount due to the chargee at the time the order was made, any further amounts falling due thereafter and an amount sufficient to cover all expenses incurred in connection with the making or carrying into effect of the order. The payment made does not comply with this requirement. It is therefore clear that there has been no breach of s. 266 of the Code by the appellant in this case.

These are some of the matters raised before us but were never raised by the appellant in the High Court when the 2nd order for sale was made on 14 June 2001. We found that the 2nd order for sale did not contravene any substantive statutory provisions and neither was it defective in substance thereby justifying this court to intervene and have it set aside. In our view, the appellant ought to have proceeded with her appeal to the High Court and ought to have applied to this court to adduce additional evidence to support her complaints. This she did not do.

Conclusion

Accordingly, we dismissed the appeal with costs and ordered the deposit be paid out to the respondent to account of its taxed costs.